No. 6529

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

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CHIN WING,
Appellant,

vs.

JOHN D. NAGLE, as Commissioner of Immigration for the Port of San Francisco, California,
Appellee.

BRIEF FOR APPELLEE.

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STATEMENT OF THE CASE

This appeal is from an order of the District Court for the Northern District of California, denying appellant's petition for a Writ of Habeas Corpus (Tr. pp. 40 and 43).

FACTS OF THE CASE.

Appellant is a male Chinese, twenty years of age, who sought admission into the United States as the foreign born son of Chin Sung, an American citizen. His application for admission was denied by a Board

of Special Inquiry on the ground that he had failed to establish satisfactorily that he is the son of Chin Sung (Tr. pp. 32 to 39, inclusive). That decision was affirmed on appeal by the Secretary of Labor (Respondent's Exhibit "A", pp. 69, 68).

ARGUMENT.

THE EXECUTIVE DECISION IS FINAL.

This is another of the great number of cases now on the docket of this Court, involving solely a question of fact which has been already passed upon by the two statutory tribunals to which the issue is committed for final determination, and the action of said tribunals has received the careful scrutiny of the Court below on habeas corpus proceedings, as well as upon a motion for rehearing in said habeas corpus proceedings.

Appellant makes an exhaustive analysis of the evidence before the executive officers, seeks to argue that the burden of proof is on the appellee, and his ultimate contention is that the executive tribunals should have decided in his favor.

At the outset we desire to point out that the burden of proof was on the applicant.

8 U. S. C. A., sec. 221;

Wong Foo Gwong v. Carr, (C. C. A. 9) 50 F. (2d) 360 at 362;

Tillinghast v. Flynn ex rel. Chin King, (C. C. A. 1) 38 F. (2d) 5.

Furthermore, Congress has expressly provided that the decision of the Board of Special Inquiry and of the Secretary of Labor "shall be final".

8 U. S. C. A. secs. 153, 174;
United States v. Ju Toy, 198 U. S. 253 at 262.

Appellant stresses the evidence which he claims is favorable to him. We submit that the question of the weight of that evidence is committed to the executive tribunals and is not open to consideration by this Court.

The leading case of

Chin Yow v. United States, 208 U. S. 8,

has definitely laid down the limits of the jurisdiction of the Court in these matters. In that case the Court said:

> "If the petitioner was not denied a fair opportunity to *produce* the evidence that he desired, or a fair though summary hearing, the case can proceed no farther. *Those facts are the foundation of the jurisdiction of the District Court, if it has any jurisdiction at all.* It must not be supposed that the mere allegation of the facts opens the merits of the case, *whether those facts are proved or not.* And, by way of caution, we may add that jurisdiction would *not* be established simply by proving that the Commissioner and the Department of Commerce and Labor *did not accept certain sworn statements as true, even though no contrary or impeaching testimony was adduced.*"

And in conclusion, the Court said:

> "But unless and until it is proved to the satisfaction of the Judge that a hearing properly so called was denied, the merits of the case are not open, and, we may add, the denial of a hearing cannot be established by proving that the decision was wrong."

We submit that in the case at bar appellant's argument is simply an attempt to prove that the decision was wrong.

We turn to the case of

> *Tisi v. Tod,* 264 U. S. 131, decided by the Supreme Court in 1924.

In that case the doctrine of *Chin Yow v. United States* was reaffirmed and clarified. We also point out that in *Tisi v. Tod* the Government was seeking to expel an alien resident, on the ground that he was of a class subject to deportation under the immigration laws. Hence in that case the burden was on the Government, and the doctrine of that case is *a fortiori* applicable in an exclusion case where the burden is on the person seeking entry.

In the case of *Tisi v. Tod,* the contention was that there was no evidence to support the executive finding. The Court said:

> *"We do not discuss the evidence;* because the correctness of the judgment of the lower court *is not to be determined by enquiring whether the conclusion drawn by the Secretary of Labor from the*

evidence was correct or by deciding whether the evidence was such that, if introduced in a court of law, it would be held legally sufficient to prove the fact found.

"The denial of a fair hearing is not established by proving merely that the decision was wrong. Chin Yow v. United States, 208 U. S. 8, 13. This is equally true *whether the error consists in deciding wrongly that evidence introduced constituted legal evidence of the fact* or *in drawing a wrong inference* from the evidence."

In conclusion the Court said:

"* * * mere error, *even if it consists in finding an essential fact without adequate supporting evidence,* is not a denial of due process of law."

Appellant places great reliance on the points in the evidence which he claims are favorable to him.

"* * * but this, with all the other evidence in the case, was for the consideration of the officers to whom Congress had confided the matter for final decision."

Tang Tun v. Edsell, 223 U. S. 673, at 681.

"We cannot assent to the proposition that an officer or tribunal, invested with jurisdiction of a matter, loses that jurisdiction by not giving sufficient weight to evidence * * *".

Lee Lung v. Patterson, 186 U. S. 168, at 176.

Regarding previous assertions of appellant's alleged relatives that there was in the family such a son as

appellant claims to be, it is obvious that the question before the executive tribunals involved not only whether the alleged father in fact had such a son, but also whether this particular individual is that son. Upon this question, certainly the weight of the declarations was for the tribunals to whom the matter is committed for final determination.

The rejection of the appellant's claim is primarily based upon certain conflicts and improbabilities in the testimony, which led the Board to believe that the witnesses were testifying from a prepared story, the Board also pointing out that when asked certain questions the witnesses became evasive and indefinite in their answers (Tr. p. 38).

Of course, the tribunal which saw and heard the witnesses properly took such matters into consideration, even though the naked record cannot adequately reflect these acid tests of credibility. Such indicia are vital in determining the facts and in weighing the evidence offered to establsh the claim.

In

Quock Ting v. United States, 140 U. S. 417, at 420,

the Supreme Court said:

> "He may be contradicted by the facts he states as completely as by direct adverse testimony; and there may be so many omissions in his account of particular transactions, or of his own conduct, as to discredit his whole story. His manner, too, of

> testifying may give rise to doubts of his sincerity, and create the impression that he is giving a wrong coloring to material facts. All these things may properly be considered in determining the weight which should be given to his statements, although there be no adverse verbal testimony adduced."

That statement is particularly apt in these Chinese exclusion cases, because as this Court itself has said:

> "In cases of this character, experience has demonstrated that the testimony of the parties in interest as to the mere fact of the relationship cannot be safely accepted or relied upon. Resort is, therefore, had to collateral facts for corroboration or the reverse."
>
> *Hom Dong Wah v. Weedin,* 24 Fed. (2d) 774; *Siu Say v. Nagle,* 295 Fed. 676.

The Supreme Court in

> *Tulsidas v. Insular Collector of Customs,* 262 U. S. 258, at page 265,

pointed out that the judgment of the executive officers is based on their knowledge of the conditions obtaining, on their contact with the applicant, and on their estimate of the applicant's claims, and *"we should not view the spoken word * * * separate from that contact and that estimate".*

We proceed to analyze the conflicts and the adverse features in the testimony.

Appellant's alleged brother was last in China from December, 1917 to July, 1919 (Tr. p. 21). In October, 1922, he appeared as a witness for another alleged brother, and at that time he testified that while he was in China (from December, 1917 to July, 1919) his brother, Chin Wing, whom this appellant claims to be, was "going to school" (Tr. p. 24).

Appellant's alleged father was at home in China from August, 1920, to September, 1922, and from June, 1928, until he brought appellant to the United States (Tr. pp. 21 and 33). These are the only trips made by the alleged father to China since appellant's infancy. He testified that while he was at home in China from August, 1920, to September, 1922, appellant was actually attending school in the home village, and that appellant attended the school in the home village during that entire period of two years (Tr. pp. 23 and 24).

Hence the testimony of members of appellant's alleged brother as early as 1922 is that the boy whom appellant claims to be was going to school during 1918 and 1919, and the testimony of the alleged father, purporting to be based on actual knowledge, is that the said alleged son was attending school in the home village during all of the alleged father's stay there from August, 1920 to September, 1922.

According to appellant's witnesses, then, we have the boy he claims to be attending school in 1918, 1919, 1920, 1921 and 1922 in the home village. This particu-

lar testimony relates only to periods when the respective witnesses were actually at their home in China.

Let us compare appellant's testimony:

Appellant testified that he *first started to attend school in 1926,* that this was not in the home village but in Sun Ning City, *that he never attended any other school,* that he has only been attending school *four years altogether,* that he first started to attend school *at the age of sixteen years,* and that *he never at any time attended school in the home village* (Tr. 25, 26).

Appellant was then advised that his alleged father stated that he had attended another school prior to attending the school at Sun Ning City. Appellant then stated that he attended school *"a few days"* at the home village *"about five years ago"* (which would be about 1925) (Tr. pp. 25 and 26). In answer to a question as to why he did not attend school, except for a few days, until he was sixteen years old he said "my mother told me to begin school at the age of sixteen" (Tr. p. 27).

Just such a point as this, we submit, is extremely vital in determining, in this particular class of cases, the identity of the individual who is seeking to come in as the foreign born son of an American citizen. The situation is this: Appellant claims to be Chin Wing. Testimony given eight years ago by Chin Wing's brother, who had been at home from December, 1917 to July, 1919, was that Chin Wing was going to school

during that period. Testimony of the alleged father is that, while he is uncertain as to Chin Wing's schooling when he, the alleged father, was in the United States, he does know that Chin Wing was going to school in the home village from August, 1920 to September, 1922. He, the alleged father, was at home during that period.

Hence taking only the testimony which purports to be based on first hand knowledge, it is established that Chin Wing was attending school during the years from 1918 to 1922. This appellant, however, testified positively that, except for a few days about five years ago, he never attended any school until 1926. His own testimony on this point is substantial evidence that he is not Chin Wing, the reputed son of Chin Sung. It is just such matters as these which afford a practical test of the truth of the appellant's claim and of the veracity of the evidence offered to identify him.

In

Tulsidas v. Insular Collector of Customs, supra,

the Supreme Court pointed out that the law, in administration of its policy, has appointed officers to determine these cases "on practical considerations", and that the Court should

> "leave the administration of the law where the law intends it should be left; to the atten n of officers made alert to attempts at evasion of it and instructed by experience of the fabrications which will be made to accomplish evasion."

Such disagreement as we have in this case relative to school attendance of the applicant has been frequently held to be material to these administrative inquiries.

In

Lee How Ping v. Nagle, (C. C. A. 9), 36 Fed. (2d) 582,

the applicant had no recollection of having attended school in the home village for a period of nearly two years with an alleged brother at the time the applicant was about seven years of age, although the testimony of the applicant's witnesses was that the applicant had attended school in the home village since the age of about six years. This Court said:

> "These discrepancies are of the sort that tend to show that the applicant was not a member of Lee On's family as claimed, and therefore the decision of the Immigration authorities having been arrived at by due process of law could not be disturbed."

In

Yee Chun v. Nagle, (C. C. A. 9), 35 Fed. (2d) 839,

the applicant disagreed with his witnesses regarding which building in the village housed the school which he claimed to have attended. His Honor Judge Rudkin said:

> "The place where the appellant and his alleged prior landed brother attended school was neces-

> sarily within the personal knowledge of all three witnesses, and the discrepancy in their testimony in that regard is not easily accounted for. At least the finding of the board that the relationship was not established to its satisfaction is not without support in the testimony."

Certainly, if a disagreement as to the building in which the applicant attended school in the home village is sufficient to sustain the excluding decision, there can be no doubt that flat disagreement as to whether he ever went to school in the home village at all is sufficient.

In

> *Hom Dong Wah v. Weedin,* (C. C. A. 9), 24 Fed. (2d) 774,

Circuit Judge Rudkin stated a similar disagreement, as follows:

> "The appellant testified that he attended school at another village up to within two or three days of his departure from China, whereas the alleged father testified that the appellant had not attended school for more than a month before leaving China",

and as to the effect of discrepancies of that character, Judge Rudkin said:

> "Viewed in this light, we are not prepared to say that discrepancies such as those found here, relating as they do to the home life and surroundings of the parties, are not sufficient to raise a substantial doubt as to the relationship claimed."

In

Moy Chee Chong v. Weedin, (C. C. A. 9), 28 Fed. (2d) 263,

the alleged brother of the applicant testified that he had left school four years before he came to the United States, whereas the applicant testified that this alleged brother had come to the United States as soon as he left school. The Court said:

> "It is not conceivable that the appellant could have been ignorant of the fact that his alleged brother had been out of school for four years before coming to the United States, and that he had been working in the rice fields."

In

Weedin v. Yip Kim Wing, (C. C. A. 9), 41 Fed. (2d) 665,

this Court said:

> "Appellee further states that the only school he ever attended was in the Ung On village, while the father claims that he never went to school there and always went to school in the Hong Mee village and that he was attending school there when the alleged father arrived from China, in January, 1927. The appellee and the alleged father also differ as to the name of the teacher. The alleged father also testifies that the mother wrote him that the applicant had attended school in Sai How village for one year.
>
> "In view of these discrepancies in the testimony relied upon by the applicant we cannot say that

the applicant was denied a fair hearing on the question of his right to enter the United States."

In

Weedin v. Lee Gock Doo, (C. C. A. 9), 41 Fed. (2d) 129,

this Court said:

"In 1926, applicant testified that he attended school in his home village, Ping On, for two years, with his alleged brother, Lee Gock Din, before going to Foo San village to school. At the last hearing both applicant and his father testified that applicant had never attended any other school than the one in Foo San village."

* * * * * *

"On this record, despite the substantial agreement in the testimony at the last hearing taken alone, it cannot be said that the conclusion reached by the Board of Special Inquiry was without foundation, and hence arbitrary and capricious. *Moy Chee Chong v. Weedin,* 28 Fed. (2d) 263. The unexplained discrepancies in the 1926 record, and between that record and the one at the last hearing, *are as to matters in which a reasonable degree of agreement would be expected were the persons involved members of the same family. Chin Share Nging v. Nagle,* 27 Fed. (2d) 848."

Appellant seeks to argue that the alleged father may have been confused as to the school attendance of Chin Wing because he has four other children whose school experiences have been varied. However, the alleged

father's testimony relates to the time he was at home in China from August, 1920 to September 1922. At that time the alleged father, according to his testimony, only had two children in China, viz., Chin Wing and Chin Fang. The eldest son had come to the United States many years before that time (Tr. p. 21), and the two alleged offspring of the second marriage were not born until January, 1922 and September, 1929, respectively (Respondent's Exhibit "A", p. 16).

It is obvious, therefore, that appellant's suggestion in this regard is without merit. Furthermore, the appellant is in direct conflict, not only with the alleged father, but with the alleged brother, who testified that Chin Wing was attending school when he himself was in China from December, 1917 to July, 1919, whereas appellant claims that he went to school for the first time in 1926, except for a few days' attendance about 1925.

Appellant attempts to show that the alleged father's memory was not entirely clear on this point. However, appellant is very careful to quote only that portion of the alleged father's testimony regarding the applicant's schooling at times when the alleged father was not in China. He refrains from quoting the vital portion of the alleged father's testimony, which is that pertaining to the particular period when the alleged father was there, viz.:

> "Q. *During your visits* that you made to China, was this applicant actually attending school in the home village?

A. Yes, except on my last trip, when he was attending school at Sun Ning City.

Q. You were in China on your second last trip from 1920 to 1922. During that entire period of time did the applicant attend school in the home village?

A. Yes.

Q. At that time was there only one school held in your village?

A. Yes, just one.

Q. And that was the Oon Mook School?

A. Yes.

Q. Did the applicant have a summer vacation in that school?

A. Yes." (Tr. pp. 23 and 24.)

Also, the testimony given by the alleged brother in *1922,* viz.:

"Q. What was your brother Chin Wing doing when you were last in China?

A. Going to school." (Tr. p. 24.)

The cases appellant cites are not in point.

In

Wong Bing Pon v. Carr, 41 Fed. (2d) 604,

which he cites, there was merely an apparent discrepancy as to dates, and the examination was not pursued to determine whether there was actually a disagreement in substance.

In

Nagle v. Jin Suey, 41 Fed. (2d) 522,

all the witnesses agreed as to the appellee's schooling, but about eight years earlier the alleged father had stated that his son was then attending school in Canton, a fact of which he could not personally know, because he had not been in China for some time. The Court expressly said:

> "The father at least *never testified from his own knowledge;* he was in this country and could only state what he had heard or, as was seemingly the case here, what he assumed to have been done as the result of certain instructions he had given."

We would invite attention to the fact that Jin Suey was discharged in the District Court by the same Judge who denied appellant's petition in the Court below.

We again wish to point out that in the case at bar we are not concerned with the alleged father's knowledge or lack of knowledge of the applicant's schooling at any time when the alleged father was in the United States. This repetition is made because of appellant's attempt to limit the matter to that phase. What we actually have is direct testimony of the alleged brother on one occasion, and of the alleged father on another, pertaining respectively to times when each was at home in China, and purporting to be based on personal knowledge.

In

Louie Poy Hok v. Nagle, 48 Fed. (2d) 753,

the Court expressly said that the discrepancy referred to "the exact details as to the date" on which the applicant went to a neighboring village to enter a school there. That case, likewise, is obviously not in point.

The second adverse feature pointed out by the executive tribunals relates to the location of the grave of appellant's alleged mother.

The alleged father testified that the grave of his first wife (appellant's alleged mother) is a short distance "back or south" of the home village (Tr. p. 28). Later in the course of his examination he repeated that it is three or four lis (from one to one and one-third miles) back of the village (Tr. p. 29). It is also claimed that he and appellant visited the grave together as recently as April, 1929 and April, 1930 (Tr. pp. 28 and 29; Respondent's Exhibit "A", p. 26). The alleged father's testimony in 1922 is to the same effect, viz., that his first wife's grave is "just a little back of our village" (Respondent's Exhibit "D", p. 16).

Although appellant's alleged mother is said to have died in 1919 (Respondent's Exhibit "A", p. 24), and although appellant claims to have visited her grave every year (Id. p. 26), appellant testified that her grave is in *front* of the village, he giving the direction of the grave as northeast from the village (Tr. p. 29).

On this point the Secretary of Labor said:

> "If this were merely a disagreement as to directions described by reference to the cardinal points of the compass, it might not be held to be definite and serious, but it is made definite by the fact that the alleged father places the burial place behind the village, whereas the applicant places it in front." (Respondent's Exhibit "A", p. 68).

As additional proof that this is no mere confusion in the minds of the witnesses, we would point out that both the alleged father and appellant agree that the home village faces north (Respondent's Exhibit "D", p. 14; Tr. p. 29).

In

Wong Sun Ying v. Weedin, 50 Fed. (2d) 377,

this Court said:

> "If the subject is psychologically important, and if it concerns the intimate family life, then a discrepancy with reference to it is inconsistent with the alleged relationship. This is the essence of the test used by this Court in the case of Weedin v. Yee Wing Soon, 48 Fed. (2d) 37."

Can anything be of greater psychological importance to the mind of a twenty year old youth, or can anything be more closely related to the intimate family life, than the location of the nearby grave of the youth's own mother? In the case at bar, it is claimed by appellant that he made ceremonial visits to that grave every

year. Is it reasonable to suppose that in such circumstances he would not know whether the grave is in front of the village or back of the village?

Appellant suggests in his brief that the hill in which the alleged mother is buried may extend all around three sides of the village, forming a semi-circle. But, in 1922 the alleged father testified that it was back of the village, and he now testifies that it is back of the village. This attempted reconciliation of the conflict is most unconvincing.

There was no such conflict in the cases which appellant cites. In those cases there were merely minor discrepancies relative to the grave of more distant ancestors.

Certainly, the Board of Special Inquiry and the Secretary of Labor were not arbitrary in considering that if appellant were the person he claims to be there should be no such disagreement on a matter so intimately related to the life of a Chinese family.

The third adverse feature arose in the questioning of the parties relative to the description of their alleged home in China. The applicant testified that two of the rooms in that five room house are bedrooms, and that there is a double skylight in each bedroom (Tr. p. 30). In order to test the accuracy of his description of the house in which he claims to have always lived, the Board questioned the alleged father as to this matter. The alleged father said:

> "I do not know how many skylights there are in the bedrooms because *I did not enter them while I was in China during my last trip.*" (Tr. p. 31.)

It will be recalled that the alleged father was last in China for a period of two years immediately prior to the hearing, he having accompanied the appellant to this country. Attention is also invited to the testimony of the alleged father that during that entire period "I had no occupation, just stayed around home" (Tr. p. 27).

The Board of Special Inquiry and the Secretary of Labor were impressed with the inherent improbability of the testimony that the alleged father, during the entire two years spent at his five room residence, never entered two of those five rooms. Taking this in connection with other significant features of the examination, the Board was led to the opinion that the witnesses were testifying from a prepared story, and that the alleged father, in this respect, was evading the questions for fear of giving some information on a point relative to which appellant might not be prepared, and with which appellant's testimony might disagree (Tr. p. 38).

Let us examine the purported explanation attempted to be made for this surprising statement of the alleged father.

It is stated that the reason the alleged father did not enter either of the two bedrooms during the two

year visit, from which he had just returned, was that these bedrooms were occupied by his daughters-in-law. Does that statement jibe with the testimony? An examination of the testimony conclusively demonstrates that it does not.

The testimony is that appellant did not marry until January 16, 1929 (Tr. p. 32). The alleged father arrived at home about July, 1928 (Tr. p. 27). He testified that when he reached home the small door bedroom was vacant (Tr. p. 31), but he still insisted that during the six months from his arrival until the marriage of appellant, he did not enter that room at all (Tr. p. 31). His testimony is that his second son, Chin Fang, and the latter's family moved away in 1926 (Tr. p. 31), and it appears that since that time they have been living in Canton City (Respondent's Exhibit "A", pp. 16 and 17), and only made two visits to the family home during the alleged father's last visit to China, the first being six or seven days after the alleged father's arrival, on which occasion they only stayed for two or three days, and the second being at New Year's, at the end of 1928 (Id. pp. 18 and 19).

It is obvious, therefore, that according to the testimony one of the two bedrooms in the five room house was vacant for at least six months after the alleged father reached home about the middle of 1928, and this is not disputed. Even if there were a reason for not entering either of the two rooms for the balance of his visit, certainly it is highly improbable that one who has just returned to his home in a distant land after

an absence of six years would not enter one of the bedrooms of that five room house during the first six months of his visit there, it being admittedly unoccupied during that period.

Such a statement would subject the credulity of any tribunal to a severe strain.

Coupling that extremely unconvincing testimony with the other matters which we have discussed above, and with the fact that the Board was impressed with the evasive and indefinite testimony in certain respects, we submit that the rejection of appellant's claim by the tribunals, to which the matter is committed by the statute for final determination, and which saw and heard the witnesses, is justifiable and cannot be said to be arbitrary.

CONCLUSION.

Appellant's claim is that he is Chin Wing, the reputed son of Chin Sung. All the previous testimony of the members of the family, covering the periods when the witnesses were actually at home in China, is that Chin Wing was attending school in 1918, 1919, 1920, 1921, and 1922. Appellant positively denied that he ever attended school before 1926. He also positively denied that he ever went to school in the home village. After being informed that the alleged father disagreed with him, he stated that he went to school in the home village for "a few days", and that this was "about five

years ago" (which would be about 1925). This substantially discredits appellant's claim that he is Chin Wing, the son of Chin Sung. Furthermore, his own testimony contradicts all the other testimony of record relative to the location of the grave of his alleged mother, which he claims to have visited every year. The Board was impressed with the fact that on certain particulars the witnesses were evasive and indefinite in their testimony, indicating a prepared story. This is particularly borne out by the highly improbable claim of the alleged father that during the two years of the visit to China, from which he had just returned, he did not enter two of the five rooms of his house. Clearly there was substantial reason for any tribunal to reject the claim.

We submit that the order of the Court below should be affirmed.

Respectfully submitted,

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